

VI. ENFORCEMENT ISSUES (NPRM 99-78-84)

NYNEX demonstrated in its Comments that there was a need for the Commission to establish detailed requirements for the filing of a section 274 complaint.⁵¹ However, there is no reason to shift to the BOCs a burden of disproving allegations of noncompliance. There is no support for such a shift in the language or legislative history of section 274. Further, a shift in the burden of proof to the defendant would be contrary to fundamental notions of administrative law and due process.

MCI argues that a complainant could establish a *prima facie* case of a section 274 violation (justifying a shifting of the burden of proof) by alleging that a BOC is providing facilities to the complainant on less favorable terms than the terms it provides such facilities to its electronic publishing affiliate.⁵² For the reasons stated in its Comments, NYNEX believes that complaints must satisfy certain evidentiary standards, not merely allege facts which, if true, would constitute a violation of the statute, and that a BOC's answer to a complaint must meet similar standards.⁵³

only the BOCs and GTE are required by ONA rules to respond to network service requests made by telemessaging providers (because they are enhanced service providers). However, as noted in NYNEX's Comments in Docket 96-149, when a BOC meets the section 251 checklist requirements, a BOC's network will be fundamentally unbundled into network elements, features, functions, and capabilities. At that time, the BOC should be relieved of its CI-II, CI-III, and ONA obligations. Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket 96-149, Notice of Proposed Rulemaking, FCC 96-308, released July 18, 1996; NYNEX Comments filed August 15, 1996 at 47-48.

⁵¹ NYNEX 29-31.

⁵² MCI 8.

⁵³ NYNEX 29-31.

Two commenters support the Commission's tentative conclusion that the burden of proof in complaint proceedings should shift to the BOC once the complainant has made out a *prima facie* case (NPRM ¶ 79).⁵⁴ These commenters offer rhetorical, but not convincing, justification for their position. AT&T appears to base its argument on its statements that section 274(e) requires the Commission to establish procedures for the expedited consideration and determination of complaints and that section 274(e) establishes expedited time limits for Commission action. Section 274(e) does neither.⁵⁵ MCI attempts to base its justification for a shifting of the burden of proof on its allegation that the BOC will "control" and "have better access to the relevant information", and that shifting the burden "would clearly promote the pro-competition goals of the 1996 Act" by providing an incentive for the BOC to treat competitors in a lawful manner.⁵⁶ Such arguments are not persuasive. A BOC already is required to treat competitors lawfully and is subject to sanctions if it does not do so. Shifting the burden of proof will not give it any greater reason to comply with the law.

If the Commission first requires the complainant to establish a *prima facie* case as discussed above, NYNEX has already suggested that the BOC should be required to

⁵⁴ AT&T 24, MCI 8-9.

⁵⁵ AT&T 23. AT&T combines its arguments regarding section 274 complaint procedures with its arguments regarding procedures for the filing and consideration of complaints under sections 260(b) and 275(c). Unlike section 274(e), those sections do require expedited review.

⁵⁶ MCI 8-9.

provide a sworn response which contains specific information and documentation.⁵⁷

However, shifting the ultimate burden of proof to the BOC is not only violative of due process and contrary to analogous procedures before other agencies, but also puts the BOC in the unfair position of having to prove a negative. NYNEX again urges the Commission not to adopt its proposal to shift the burden of proof of violations of section 274 to the defendant BOC.

VII. CONCLUSION

In this proceeding, the Commission seeks to implement rules for the BOC provision of electronic publishing, alarm monitoring and telemessaging services in accordance with the new pro-competitive, de-regulatory national policy framework designed by Congress. To reflect the Congressional intent implicit in the 1996 Act, the Commission should adopt rules which prevent potential anti-competitive behavior by the BOCs without depriving the BOCs of legitimate competitive advantages which will benefit consumers and promote competition. NYNEX urges the Commission to adopt NYNEX's proposals which will achieve the pro-consumer and pro-competitive results envisioned by Congress, and to reject the recommendations of those who would have the Commission

⁵⁷ NYNEX 31.

NYNEX REPLY
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impose duplicative, unnecessary and uneconomic regulations which would hamper the
BOCs' ability to fairly compete and effectively meet customer requirements.

Respectfully submitted,

NYNEX Corporation

By:

A handwritten signature in black ink, appearing to read "John F. Natoli", is written over a horizontal line.

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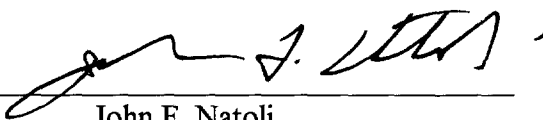
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Dated: September 20, 1996

CERTIFICATE OF SERVICE

I, John F. Natoli, hereby certify that on the 20th day of September, 1996, a copy of the foregoing NYNEX Reply Comments in Docket No. 96-152 was served on each of the parties listed on the attached Service List by first class U.S. mail, postage prepaid.



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